National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

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Building & Trades Council, et al. (Kaiser Engineers, Inc.), Case 1-CE-71

584-5000

This case was submitted for advice as to: (a)whether a provision in a contract is a "hot cargo" agreement; and (b)if so, whether it is privileged by the construction industry proviso of Section 8(e).

Facts

The Massachusetts Water Resources Authority (MWRA) is responsible for the Boston Harbor clean-up project under a federal court order pursuant to the Clean Water Act. 1 In April 1988, the MWRA chose Kaiser Engineers, Inc. (Employer), a well known general contractor and construction manager, to be the program/construction manager for the project.

As construction manager, the Employer is required to manage and supervise the project, including planning, procurement, budget, scheduling and labor relations matters. Because of concerns about possible conflicts of interest arising from the program/construction manager's role, the MWRA has barred the Employer from bidding on any of the construction work for the project. However, with MWRA approval, the Employer intends to employ construction trades employees on the project in certain limited circumstances. 2

In May 1989, the Employer entered into a project agreement (Agreement) with the Building and Trades Council and approximately 40 local and international construction trade unions (Unions) for the construction work on the Harbor project.3 The Agreement provides standardized working conditions for all construction employees.4 It also provides that all construction subcontractors must agree to be bound by the Agreement.

In March 1990, the Associated Builders and Contractors of Massachusetts/Rhode Island (ABC) brought a civil action, including a request for a preliminary injunction, attacking the legality of the Agreement on various grounds.5 On April 11, 1990, the district court denied the request for preliminary injunctive relief. The court found, inter alia, that the Agreement was lawful under the proviso to Section 8(e) and under Section 8(f).

On March 14, 1990, the Utility Contractors Association of New England (UCA) filed the instant charge alleging that the Agreement was in violation of Section 8(e). UCA contends that the provision is not privileged by the construction industry proviso to Section 8(e) since the Employer does not and will not employ any employees on the project.6 UCA further contends that even if the Employer employs any craft employees the Agreement is still not valid as it was entered into by the MWRA as a result of unlawful secondary pressure. In this regard, UCA relies on picketing by several Unions at other MWRA jobsites prior to the negotiation of the Agreement. Lastly, the UCA contends that even if the Agreement is lawful in general, it is unlawful with respect to surveyors since it does not cover surveyors employed by the Employer.

Action

We conclude that the provision is a "hot cargo" agreement within the ambit of Section 8(e). We further conclude that the provision was lawful under the construction industry proviso to Section 8(e).

Initially, we concluded that the clause is a "union signatory" clause and is secondary and within the ambit of 8(e). The agreement between the Employer and the Unions requires that all subcontractors on the site must be bound by the Agreement. 7 In essence, the Employer cannot do business with companies who do not agree to bound to the Union contract. Thus, the

Agreement would violate Section 8(e) unless it is encompassed by the construction industry proviso to Section 8(e).

The Supreme Court has held that the construction industry proviso to Section 8(e) authorizes a "union signatory" clause by a union and an employer in the construction industry in the context of a collective bargaining relationship.8 In the instant case, it first must be determined whether the Employer is an employer in the construction industry. The Employer is a well-known general contractor and construction manager. Indeed, in the instant case, the Employer's main responsibility is to supervise the project, including planning, procurement, budget, scheduling, and labor relations. In addition, the Employer will employ employees on the project. Where, as here, an employer's principal business is in the construction industry, and it is acting as an employer of construction employees on the particular project, it is clear that such an employer is "an employer in the construction industry" for purposes of Section 8(e).9 Moreover, even if an employer's principal business is not in the construction industry, but it acts as the general contractor on a specific construction project, the Board finds it to be an employer in the construction industry based on the degree of control it retains over the labor relations at the jobsite.10 As noted, supra, the Employer's prime responsibility in this case is to supervise labor relations on the jobsite.

Next, it must be determined whether the Agreement was entered into in the context of a collective bargaining relationship. A Section 8(f) relationship satisfies this requirement.11 In the instant case, the Employer entered into a Section 8(f) pre-hire contract with the Unions.

The Charging Party contends that there can be no bargaining relationship of any kind unless the Employer hires and intends to hire employees covered by the Agreement. The General Counsel has authorized 8(e) proceedings where the employer did not hire and did not intend to hire any construction employees. 12 However, in the instant case, the Employer intends to employ craft employees on the project, and these employees will be covered by the Agreement.13 Thus, it is clear that the Employer entered into a valid Section 8(f) relationship. Accordingly, the Agreement is protected by the proviso.

This conclusion is consistent with the district court's opinion.

Furthermore, we conclude that there is insufficient evidence to find that the Agreement was entered into as a result of unlawful secondary pressure. The picketing has not been established as unlawful. In addition, the picketing involved the MWRA, not the Employer. Moreover, none of the described activity was engaged in for the purpose of forcing the Employer or any other employer to enter into a "hot cargo" contract.

With respect to the surveyors, UCA asserts that the Employer's surveyors will not be covered by the Agreement. However, the fact is that they will be covered. The UCA's mistaken belief apparently stems from the fact that the Employer's professional engineers, who use surveyor equipment, are not covered by the Agreement. It does not appear that the "union-signatory" requirement extends to subcontractors who employ professional engineers.

Based on the above, we conclude that the instant charge should be dismissed, absent withdrawal.

H.J.D.

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1 The court order also imposes a time table for the project which involves construction of wastewater treatment facilities for the Boston Harbor.

2 M.G.L. Chapter 30, Section 39M requires that any work performed for the Commonwealth of Massachusetts must be put out to bid if the cost of that work exceeds $5,000. The MWRA and the Employer agree that the Employer can perform certain construction work in cases of default or incomplete performance by other contractors, clean-up and temporary work, and in other limited emergency situations which would cost $5,000 or less.

3 There is no contention that the Employer acted as an agent of MWRA rather than as a principal when it signed the Agreement.

4 Article II of the agreement provides that any construction work the Employer performs will also be covered by the Agreement.

5 Among other grounds, ABC argued that the Agreement, whose terms were approved by the MWRA, was preempted by the NLRA.

6 UCA disagrees with MWRA and the Employer that the Employer can perform certain construction work on the project. It argues that the Employer is prohibited by state law from doing any construction work on the project without first bidding for it. Since the MWRA has barred the Employer from bidding on any construction work, the UCA argues that the Employer will not be able to perform any construction work on the project.

7 Orange Belt District Council of Painters No. 48 (Maloney Specialties, Inc., 276 NLRB 1372, 1387 (1985).

8 See Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616, 633 (1975).

9 United Brotherhood of Carpenters and Joiners of America (Longs Drug Stores, Inc.), 278 NLRB 440, 442 (1986).

10 Los Angeles Building & Construction Trades Council (Church's Fried Chicken, Inc.), 183 NLRB 1032 (1970).

11 Los Angeles Building & Construction Trades Council (Donald Shriver, Inc.), 239 NLRB 264, 267-70 (1978), enfd. 635 F.2d 859, 872-876 (D.C. Cir. 1980), cert. denied 451 U.S. 976 (1981); A.L. Adams Construction Co. v. Georgia Power Co., 557 F.Supp. 168, 174-77 (1983), affd. 733 F.2d 853, 856-58 (11th Cir. 1984), cert. denied 471 U.S. 1075 (1985).

12 Plumbers Union Local 246 (Marlin Mechanical, Inc.), Case 32-CE-52 (l989).

13 UCA contends that, under state law, Kaiser cannot lawfully employ employees to perform work on this site. However, the state agency, MWRA, has decided that the Employer can do so, and the Employer intends to do so. In these circumstances, we do not consider it within our province to rule on the state law question.